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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52

To the Commission

REPLY COMMENTS OF NAACP AND LULAC

The National Association for the Advancement of Colored People ("NAACP") and the League of United Latin American Citizens ("LULAC") ("Civil Rights Organizations") respectfully submit their Reply Comments in response to the Notice of Proposed Rulemaking in the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings, FCC 92-98 (released April 10, 1992) ("Comparative Hearing Policies NPRM").

RESEARCH ON COMPARATIVE HEARINGS

As the Civil Rights Organizations noted in their initial Comments, there has been almost no academic research on the comparative hearing process. Therefore, the Minority Media Ownership Litigation Fund has undertaken a systematic review of all commercial FM comparative hearings decided from January 1, 1986 to the present. The research is extremely complex and it is still in process with our staff working fulltime on little else. As soon as it is completed, it will be tendered with a motion to accept it into this Docket.

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INTEGRATION CREDIT

Our initial Comments tentatively expressed the view that something might be said in favor of the elimination of integration credit.1/

There is another alternative worthy of consideration. While an owner need not be integrated into management to serve the community well, there has always been predictive value for the proposition that an integrated owner will, more often than not, be more responsive to the community than an absentee owner. It may be that this proposition is strong enough for an award of comparative credit, but not strong enough to be the mothership to which all comparative enhancements are docked.

Therefore, a good compromise between proponents and opponents of integration credit might be to treat integration as an independent comparative factor in its own right, with other factors such as minority ownership and broadcast experience being considered at the same logical tier of analysis. Were this done, integration credit should have moderate weight, minority ownership substantial weight, civic participation (wherever acquired) would have substantial weight, and broadcast experience (as more broadly defined as suggested in our Comments) would have at most slight weight.

1/ We reasoned that the elimination of integration credit could permit those minorities already successful in business, but not in a position to operate a broadcast station personally, to have a realistic chance of winning a permit without the need to join forces (legitimately or illegitimately) with a potential general manager. Civil Rights Organizations' Comments at 14.

ENHANCEMENT FACTORS

Local Ownership and Civic Participation

Our initial Comments, at 20-21, tentatively advocated the elimination of local ownership credit, assuming that integration is not retained. We did not address the question of how local ownership credit should be evaluated if integration is retained, either as the principal factor triggering enhancements, or as one of several enhancements evaluated simultaneously at the same tier of "best practicable service" analysis.

Somewhat more weight is awarded for "community of license" local residence than for "service area" local residence. This anomoly in the Commission's policies -- although facially race-neutral -- operates almost universally to the disadvantage of minority applicants. Official notice may be taken that due to residential segregation, minorities seldom have had the opportunity to live the past quarter century or more years of their lives in the suburbs of major cities. See Steelworkers v. Weber, 443 U.S. 193, 197 (1979) ("[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.") Through no fault of their own, most minorities spent most of the lives in central cities. Most valuable FM permits for central cities were awarded long before minorities stood a chance of winning these cases; now, most of the permits to serve major and even medium markets are for nearly all-white, suburban communities of license.

The Commission should recognize this historical accident which has the effect of irrationally and unfairly polluting the comparative hearing process with the present effects of past de jure residential segregation. In light of the ease of intra-market commuting, and the wide signal reach of most stations, there is no longer any logical reason to distinguish between service area and community of license local residence.2/ A de facto preference for suburban residence unlawfully preserves the present effects of past and present residential segregation. See 42 U.S.C. §§1982, 1983; see U.S. v. Yonkers Board of Education, 624 F.Supp. 1276, 1533 (S.D.N.Y. 1985) (subsequent history omitted) (school desegregation relief ordered where "some meaningful connection exists between the policies of public housing officials and the policies of school board officials.") A comparative advantage inadvertently tied to past or present segregation must not be allowed to outweigh, nullify or neutralize an applicant's minority ownership credit. See Waters Broadcasting Company, Inc., 91 FCC2d 1260 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert denied, 470 U.S. 1027 (1985).3/

2/ Eliminating this artificial distinction between community of license and service area residence would also have the salutory effect of simplifying judicial determinations on this issue.

3/ The Commission already treats service area residence as comparable to community of license residence in TV hearings. Minority Broadcasters of East St. Louis, Inc., 99 FCC2d 264 (Rev. Bd. 1984), modified on other grounds, 57 RR2d 1390 (1985); aff'd mem. sub nom. Spectrum Telecommunications Corp. v. FCC, No. 85-1249 (D.C. Cir., April 9, 1986). Since TV and FM signals each typically cover entire markets, there is no logical reason not to extend this concept from TV to FM.

"Finders" Preference

Our initial Comments expressed the tentative view that the proposed "finders preference" is probably unlawful (at least when applied to proceedings containing a minority applicant) because it attempts to dilute and diminish the minority preference indirectly, a feat which could not be accomplished directly. We further noted that a "finders" preference will likely stimulate numerous spurious rulemaking proposals and counterproposals by those not genuinely intending to serve the public, but desiring simply to get a comparative lock on a frequency, thereby imposing needless costs on the Commission.

On reflection, we amend our view from tentative to definitive. The "finders" preference would unlawfully dilute the minority preference, contravening the clear intent of Congress. See Pub. L. 102-140 (October 28, 1991). It would do this on the thinnest of pretexts, the notion that the act of hiring an engineer to file a drop-in proposal suggests that the person signing the proposal will be a better broadcaster than any other applicant. Not a shred of evidence -- not even one concrete example -- has been presented to support this view.

One commenter suggests that if minorities would just start being "finders" they could get a lock on allotments. Rochlis Comments at 5. The idea that minorities should file counterproposals simply to obtain a comparative preference -- and not necessarily because they really want the station licensed to one community more than another -- would move the Commission in the direction of adopting just the type of "strange and unnatural" arrangement questioned by the Court of Appeals in Bechtel v. FCC, ___ F.2d ___, 70 RR2d 397, 401 (D.C. Cir. 1992).

The "finders" preference, which will almost always benefit nonminorities at minorities' expense, cannot be somehow pawned off as a pro-minority initiative simply because minorities are also free to use it. Minorities are also free to buy and operate daytimers and then seek daytimer preferences, but that did not stop the Commission from recognizing that the real purpose of the daytimer preference was to "balance" the minority preference. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987). Additional "balancing" is hardly needed now, inasmuch as the new multiple ownership rules and the tightening of the capital markets have minority owners in a state of hasty retreat, if not a rout.

The bottom line is that the "finders" preference will seriously dilute the minority preference at a time when such dilution is needed least.4/ Saying that minorities will still have a right to apply for a "finders" preference is akin to saying that minorities theoretically had a right to live within the new boundaries of Tuskegee, Alabama in 1960 and thereby could have exercised the franchise there. See Gomillion v. Lightfoot, 364 U.S. 339 (1960).

4/ See NTIA's November, 1991 report on Minority Ownership Trends, which found that the number of minority owned commercial television and radio stations declined from 301 to 287 (from 2.9% to 2.7%) in just one year, even as the total number of stations was increasing. This represents a 4.7% decline in minority ownership in one year -- the first decline in the history of broadcasting.

Diversification/Multiple Ownership

Unlike the NAB (NAB Comments at 6-7) we favor continued use of diversification as a comparative factor to promote new voices. In most communities for which new FMs are being licensed, listeners do not have the national average of 24 signals. Even where they do, it may be that the 25th signal will meet an unmet need. As the Commission has recognized, there can never be too much diversification. In Multiple Ownership of Broadcast Stations, 22 FCC2d 306, 311 (1970), it held that "[a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated."

The beauty of comparative hearings is that they present the only realistic hope for newcomers, especially historically excluded newcomers, to get access to the air. Incumbents have had their chance. If they want access, they can invest in newcomers' applications. Incumbents, and their surrogates, already frequently prevail in these hearings by outspending everyone else. Minorities only have 2.5% of the stations in the country. Do nonminorities want that too?

DUE PROCESS RIGHTS

The Civil Rights Organizations enthusiastically endorse the FCBA's view that comparative applicants should have a robust right to test one anothers' bonafides in hearing. FCBA Comments at 10-12. The adversarial process is a time-tested means of insuring that sham applicants and front groups are exposed for what they are.

At the same time, the Commission should take this opportunity to caution against lawyers' overdoing it in these cases. Often the cumulative litigation costs for applicants (not to mention the Commission) exceeds the stick value of the permit. In particular, the Commission should honor the Supreme Court's admonition that the discovery rules "are subject to the injunction of [Fed. Rules Civ. Proc.] Rule 1 that they 'be construed to secure the just, speedy, and inexpensive determination of every action....[T]he district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."' Fed. Rules Civ. Proc. 26(c)...." Herbert v. Lando, 441 U.S. 153, 60 L.Ed.2d 115, 134 (1979) (emphasis in text, citations omitted).

Respectfully submitted,

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FROM

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 22nd day of June, 1992 caused a copy of the foregoing "Reply Comments" to be delivered via U.S. First Class Mail, postage prepaid, to the following:

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